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ABSTRACT

This paper analyzes the present state of the law and offers some suggestions for school officials who seek to update their school regulations concerning student publications. It examines court cases in such areas as restrictions on the time, place, and manner in which students can distribute publications; prior restraint or censorship of materials; vagueness of regulations; and publications sponsored by the school and publications not sponsored by the school. The trend of federal court decisions has been to expand the applications of First Amendment freedoms to the publications of secondary school students, but whether this trend will continue depends at least in part on the willingness of school officials to seek out broader and more acceptable bases for resisting the directions taken by the courts where they believe that the courts are going too far. (Author/IRT)

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A Legal Memorandum

NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS
1904 Association Drive Reston, Va. 22091

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TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC) AND USERS OF THE ERIC SYSTEM."

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ADMINISTRATIVE CONTROL OF STUDENT PUBLICATIONS

School administrators have been concerned about the control of student publications at least since the morning of October 22, 1777, when the faculty of the William Penn Charter School in Philadelphia was confronted with neatly handwritten copies of the first "underground" newspaper, entitled the Student Gazette.[1] Relatively few questions concerning administrative control of student publications reached the courts until the 1960s. By the end of that turbulent decade, however, the legal challenges to school authority over student publications were coming thick and fast. NASSP published a Legal Memorandum on the subject in October 1971.

Since that time, federal judges have steadily expanded the First Amendment rights of student editors of both school-sponsored and so-called "underground" publications. Federal judges have gone so far toward unlimited First Amendment rights for student journalists that respected and responsible educational leaders have declared that the courts have lost sight of the distinction between liberty and license.[2]

Although many educators will agree with that assessment, it is nevertheless essential that school officials be familiar with the law on this subject. This Legal Memorandum attempts to analyze the present state of the law and to offer some suggestions for school officials who seek to update their school regulations concerning student publications.

BACKGROUND: Starting with *Tinker*

Litigation involving student publications almost always takes place in federal courts, where students have found a more receptive hearing for their First Amendment claims. In deciding such cases, federal judges usually begin with the guidance supplied by the United States Supreme Court in the famous *Tinker* case.[4] In that decision, the Supreme Court said this about the First Amendment rights of secondary school pupils:

> School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect. Just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. (Emphasis supplied.) (393 U.S. at 511)

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This opinion, together with the Supreme Court's frequently reasserted position that any system of prior restraint of expression bears a heavy presumption against its constitutional validity,[6] means that any school official who has to defend in federal court the exercise of control over a student publication must first show that the control is within the constitutional parameters established by existing case law.

One part of the applicable case law is the concept, noticed by several federal courts in student publications cases [31] [33] that the First Amendment rights of high school pupils are not identical with those of college students or adults. In the words of the United States Court of Appeals for the Fourth Circuit: [31]

> ...publications may be protected when directed to adults but not when made available to minors, or as Justice Stewart emphasized it in his concurring opinion in *Tinker*, First Amendment rights of children are not "co-extensive with those of adults." Similarly, a difference may exist between the rights of free speech attaching to publications distributed in a secondary school and those in a college or university. (453 F. 2d at 57-58)

Despite such statements, the decided cases have not drawn a clear line between the rights of student journalists in colleges and those in high schools. As a result, the principles established in college cases have been influential in the outcomes of cases involving high school publications. For this reason, the holdings of such cases must be considered in developing student publication rules for high schools.

Likewise, the courts have applied the First Amendment to both tax-supported, school-sponsored publications and to so-called "underground" newspapers and other nonschool publications without making significant distinctions in the degree of administrative control permitted.

RESTRICTIONS ON TIME, PLACE, AND MANNER

In 1972 the U.S. Supreme Court upheld the conviction of a non-student for violation of an anti-noise ordinance. The defendant had been picketing and distributing literature near, though not on the grounds of a high school. Nevertheless, the Court held that the threat of disruption was sufficient to justify the regulation forbidding such activity.[18] On this basis, lower federal courts have generally agreed that school officials may adopt reasonable restrictions on the time, place, and manner of distribution of student publications. [7] [14] [37]

To be reasonable, however, the regulations must be directed toward the prevention of disruption,[44] applied equally to all publications,[38] and not intended to stifle student expression or serve as a guise for controlling the content of the publications.[37] School authorities should publish such rules,[13] but they may not require a student to obtain approval of the time, place, and manner of each separate distribution.[14]

As these general propositions suggest, very broadly written regulations on time, place, and manner of distribution will not pass constitutional scrutiny. Thus, in *Shanley v. Northeastern Independent School District*,[37] the Fifth Circuit Court held that a rule prohibiting distribution by students "at any time and in any place for any reason" was too broad and hence invalid. In *Jacobs v. Board of School Commissioners*

the Seventh Circuit Court found unconstitutional a rule forbidding any distribution by students while classes were in session. The court said:

> ...it does appear that there are periods in the morning, around noon, and in the late afternoon, when although some classes are in session, substantial students are on the premises, are not involved in classroom activity, and are barred...from distributing and indirectly from receiving student newspapers. We conclude that the defendants have not satisfied their burden of demonstrating that the regulation barring distribution at all these times is narrowly drawn to further the state's legitimate interest in preventing material disruptions of class work. (490 F. 2d at 609)

Although most courts have spoken only in general about the necessity for limitations upon time, place, and manner of distribution to be specific, and directed to the prevention of disruption in the school, some provisions of such rules have been upheld. One federal court sustained a rule intended to prevent disruptions by requiring that distribution of publications be limited to the student lounge, or outside the school building.[44] A Texas court has approved a ban on reading newspapers in classes,[38] and the Seventh Circuit has held that the distribution of literature during a fire drill may be prohibited.[14] School officials may also forbid attempts to distribute through coercion of other students.

The courts have been unable to agree whether school authorities may extend restrictions of time, place, and manner to distribution of student literature made off the school grounds. On the theory that some actions of students off the school grounds affect the good order and operations of the school, a federal court in California has upheld disciplinary action against a student who distributed a nonschool publication just off the school grounds near the main entrance;[5] and a similar result occurred in a New York case involving distribution of an "underground" publication both on and off the school grounds.[33]

More recent decisions in the Fifth Circuit,[37] [38] however, have cast doubt upon the validity of any attempt to limit the rights of pupils to distribute literature beyond the school grounds outside school hours. For example, in *Sullivan v. Houston* the judge wrote:

> In this Court's judgment, it makes little sense to extend the influence of school administration to off campus activity under the theory that such activity might interfere with the function of education. School officials may not judge a student's behavior while he is in his home with his family, nor does it seem to this Court that they should have jurisdiction over his acts on a public street corner. A student is subject to the same criminal laws and owes the same civil duties as other citizens, and his status as a student should not alter his obligations to others during his private life away from the campus. (307 F. Supp. at 1341)

The Fifth Circuit Court of Appeals sustained that view in a case involving the distribution of an "underground newspaper entirely off-campus before and after school hours."[37]

Another element of school rules on time, place, and manner of distribution that has produced mixed decisions is the authority to prohibit the sale of nonschool materials on school grounds, as opposed to their distribution without charge. Even though the

federal courts have recognized the necessity for some limits on commercial activities on school grounds in the interest of an orderly educational process, the distribution by students in the school of "underground" newspapers for a nominal charge or donations has raised some difficult First Amendment issues.

In *Katz v. McAuly*[22] the Second Circuit Court of Appeals upheld a rule forbidding all solicitations of public school pupils, in the context of an attempt to distribute a leaflet in return for contributions for antiwar activists. Similarly, a North Carolina court upheld a school rule prohibiting sale of newspapers on campus.[12] Once again, however, more recent decisions cast doubt upon the constitutionality of such rules.[29] A federal court in Nebraska has pointed out that the U.S. Supreme Court held in *Virginia Board v. Citizens Council*,[45] that commercial speech activities are protected by the First Amendment. The judge thus found a school rule prohibiting the distribution of commercial literature to be invalid.[19] The Seventh Circuit has also held invalid a blanket rule against distributions of literature in exchange for money on school premises, except those for the benefit of the school.[20] The court said:

> Provisos...already regulate the place, time, and manner of distribution as to avoid interference with others and littering. They have not been challenged here. It has not been established, in our opinion, that regulation of the place, time, and manner of distribution cannot adequately serve the interests of maintaining good order and an educational atmosphere without forbidding sale and to that extent restricting the First Amendment rights of plaintiffs. (490 F 2d at 608-609)

PRIOR RESTRAINT OR CENSORSHIP

In 1931, in *Near v. Minnesota*,[26] the U.S. Supreme Court affirmed the common-law concept that the essence of First Amendment freedom of the press is the absence of any prior restraint on the content of publications. Whether school officials properly have such authority continues to be the central issue in most disputes over student publications. Attempts by the federal courts to decide exactly how *Tinker* applies to prior restraint of content by school officials have produced a complex thicket of constitutional difficulties--especially for school officials seeking to exercise control of the content of student publications.

Most school rules concerning student publications begin with some kind of requirement that material be submitted to school officials for review in advance of distribution. The federal courts are in sharp disagreement on the legality of such prior submission requirements. The Seventh Circuit Court has interpreted the *Near* and *Tinker* decisions to proscribe any such rule as an invalid prior restraint. That court did not view *Tinker* as allowing any prior restraint on student expression, but only permitting punishment after the fact for distributions or other conduct that substantially or materially disrupts school programs.[14] To the contrary, the Second,[13] the Fourth,[7] and the Fifth Circuits[37] have held that prior submission rules are not constitutional if narrowly drawn, employ detailed definitions, and contain procedural protections for the students' First Amendment rights. As the Fifth Circuit explained:

> Given the necessity for discipline and orderly processes in the high schools, it is not at all unreasonable to require that materials destined for distribution to students be submitted to the school administration prior to distribution. As long as the regulation for prior approval does

not operate to stifle the content of any student publication in an unconstitutional manner and is not unreasonably complex or onerous, the requirement of prior approval would more closely approximate simply a regulation of speech and not a prior restraint. (426 F. 2d at 960)

VAGUENESS OF REGULATION

Frequently, however, the courts have found the specific school regulations before them to be either too vague and broad to protect the legitimate First Amendment rights of students,[11] [24] [32] or lacking in the required procedural protections.[13] [31] For example, the Fourth Circuit has said that an acceptable prior submission rule must contain "precise criteria spelling out what is forbidden so that a reasonably intelligent student will know what he may write and what he may not write."[7] In addition, the court said:

> A prior restraint system...is nevertheless invalid unless it provides for (1) a definition of "Distribution and its application to different kinds of material; (2) Prompt approval or disapproval of what is submitted; (3) Specification of the effect of failure to act promptly; and (4) An adequate and prompt appeals procedure. (478 F. 2d at 1351)

A review of other federal court decisions reveals that regulations must be very specific to pass judicial muster. Here are some examples of rules which have been found invalid for lack of clarity or specificity: rules forbidding literature that incites students to disrupt,[30] is alien to school purposes,[11] is likely to produce a significant disruption of the normal educational process,[20] is obscene,[20] is libelous,[24] is grossly insulting to any group or individual,[7] or advocates illegal actions.[7]

In all these cases, the regulations were held invalid on the ground that the definition of terms was inadequate, not because the content is necessarily protected, but the problem of providing specific definitions of what may not be written is closely related to the question of what content the school may forbid under the First Amendment. The latter question will be discussed later.

The Fourth Circuit has made clear that the definition of "distribution" itself may properly vary with the material to be distributed. For most literature, for example, distribution may be regulated by a valid rule only when it is "substantial." But the distribution of even a single copy of material that is legally obscene or libelous may be proscribed.[7] A rule that defined distribution as being to "several students" has been held not to be the "substantial" distribution that may properly be regulated.[19]

The courts have been unwilling to say exactly what constitutes the definite, brief period of time allowed for school officials to make decisions, or what a prompt appeals process is, but two different federal courts have held rules allowing several weeks to pass between the request for distribution and the time final action is taken by the school board to be invalid.

By contrast, the Fifth Circuit has upheld a prior submission rule allowing a principal only one working day to grant or deny permission.[40] Also, the Fourth Circuit has suggested that the process of submitting literature for approval to distribute includes a face-to-face meeting between the student and the school official.[28]

SUBJECT MATTER WHICH CAN BE CONTROLLED

The courts do not agree on precisely what content school officials may prohibit in student publications that are distributed on school grounds. As previously noted, the Seventh Circuit Court of Appeals has held that school authorities may not limit in any way the content of student publications, believing that only post-publication punishment is proper.[14] Other federal appellate courts have disagreed, holding that there are a few carefully defined areas of content over which school authorities may exercise prior restraint. They are:

(1) Those special circumstances where school officials can reasonably forecast that distribution will cause a substantial disruption of, or material interference with, school activities[31] an exception to students' First Amendment rights authorized in *Tinker*;[41]

(2) Material that is obscene, libelous, or within the "fighting words"[10] exception to the First Amendment.[7 20 37]

As noted above, however, each of these categories must be completely and properly defined in the school rule.

Attempts to justify prior restraint of content on the basis of a reasonable forecast of disruption impose a heavy burden of proof on school officials. The courts have held that such forecasts must be supported by substantial, demonstrable, and objective evidence, and not simply by an "undifferentiated fear"[41] or apprehension of disturbance or by speculation about what "might happen" or "could result."[14 37]

Further, courts have held that literature which is controversial,[20 37] deals with sex,[6 9] is alien to school purposes,[11] criticizes school officials in a tasteless and disrespectful way,[35 38] or provokes a reaction by other students[37] has not provided an adequate basis for forecasting disruption. Several courts have pointed out that readers who are inflamed to act in a disruptive manner because of what they have read should be disciplined rather than the authors or publishers of the written material.

In addition, the Fourth Circuit has held that school rules allowing a prior restraint based on a forecast of disruption must spell out exactly what constitutes a substantial disruption or material interference with school operations and prescribe specific criteria by which forecasts of disruption are to be made.[28]

The U.S. Supreme Court has recognized that obscenity is not protected by the First Amendment.[23] In addition, it has approved a variable definition of obscenity to take into consideration the age and maturity of school pupils.[16] Notwithstanding these decisions, the lower federal courts have steadfastly refused to class as legally obscene the vulgar, profane, and indecent language to which school authorities have taken strong exception in student publications. For example, the courts have found the use of the common four-letter words or other vulgarities[24 39] which one appellate court rather gingerly called "earthy words relating to bodily functions and sexual intercourse"[35] as being within First Amendment protection in student publications. The reasoning of the courts in such cases is illustrated by the decision of a federal court in New York in a decision overruling a principal's seizure of a school publication of student essays because of inappropriate language.[23]

> The magazine contained no extended narrative tending to excite sexual desires or constituting a predominate appeal to prurient interests. The dialogue was the kind heard repeatedly by those who walk the streets of our cities, use

public conveyances and deal with youth in an open manner. It was not patently offensive to adult community standards for minors as evidenced by comparable material appearing in respected national periodicals and literature contained in the high school library. (347 F. Supp. at 459)

Regrettably, an earlier decision by a federal judge in California that allowed the school to control vulgarity and profanity has not been followed.[5] On the contrary, recent decisions require that school rules limiting obscenity in student publications contain full and explicit definitions of what is legally classed as obscene, even while recognizing that such a task has been troublesome even for federal judges.[7 20]

Similar problems can occur with attempts to control libelous material. The U.S. Supreme Court has allowed First Amendment protection, under some circumstances, for potentially libelous statements directed at public officials, including school officials.[27] A valid school rule must allow for some statements of this kind as being fair comment, and spell out in legally correct detail what other defamation is proscribed.[7] One federal appellate court has ruled that such rules may not even require publications to carry the name of the author or other responsible person as a means of fixing responsibility for libelous material.[20] Although several courts have said that "fighting words" may be prohibited,[37 38] they have not provided any definition of what this category might include, beyond the statement of the U.S. Supreme Court that they are "words which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[10]

When schools have established rules governing the distribution of literature, students who openly and flagrantly disobey such rules with conduct that shows gross disrespect and comtempt for school officials may be disciplined for such conduct.[17 33 36 40] In allowing such discipline, the federal courts are simply requiring that students who desire to challenge school publications rules do so through established channels, including recourse to the courts, rather than by egregious misbehavior.

OFFICIAL v. UNOFFICIAL PUBLICATIONS

All of the legal principles already reviewed have been applied to tax-supported, school-sponsored publications as well as to nonschool literature, with little distinction being made between them. A number of federal courts have rejected attempts by school officials to exercise more control over the content of official school publications on the theory that, because the publications are tax-supported, school officials should have powers similar to those of publishers of private newspapers.[3 8]

Courts have also denied the argument that additional control over school publications is justified because they are a part of the school's instructional program and subject to the authority of school officials to determine what is taught.[9 15] In such cases, the courts have likened school publications to extracurricular activities and have held that where a student publication has traditionally been open to the expression of student views on a variety of subjects, the publication has become a "public forum" over which school officials may not exercise content control.[3 15 46]

Following such theories, the federal courts have ruled that school officials may not discipline or remove student editors after the fact because of displeasure with the content of the publication. Thus in college cases, the removal of the student editor for poor grammar and spelling,[34] or for simply tasteless and inappropriate writings[8] has been found impermissible. Of course, attempts to require that the student editor have all material approved by the faculty before publication have also been found wanting legally.[3 43]

Although these principles have been established in cases primarily involving college publications, there is little reason to believe they would not be applied to high schools in similar factual situations. It is also likely that college cases holding that school officials may not withdraw funding of student publications as a means of controlling content[4 21] would not apply to high school publications. Such decisions, however, do not prevent the discontinuance of funding of student publications as part of a general spending reduction or for other non First Amendment reasons.

CONCLUSIONS AND RECOMMENDATIONS

This review of legal principles governing school rules on student publications and distribution of literature reveals that the task of writing a school regulation which will withstand constitutional attack is a complex undertaking that can only be accomplished successfully with the aid of legal counsel and after a thorough review of the applicable case law of the jurisdiction.

The proper components of such rules may vary from one school system to another, especially with respect to the time, place and manner restrictions which may vary from one school building to another. Nevertheless, school officials developing or reviewing student publication regulations may wish to review the regulation of the Board of Education of Baltimore County, Md. which was developed after protracted litigation,[28] and approved as constitutional by Chief Justice Northrop of the U.S. District Court for the District of Maryland. A copy may be ordered from the Board of Education of Baltimore County, 6901 N. Charles St., Towson, Md. 21204.

It is also worth noting that some courts may be more amenable to the control of certain kinds of student activities that involve publications, if they do not arise in the content of the First Amendment, and particularly, prior restraint of publication. The recent decision of the Second Circuit U.S. Court of Appeals in the case of *Tractman v. Anker*[42] is a good example.

In this case, the court held that school officials did not act unreasonably or unconstitutionally when they prohibited the editor of the school newspaper from distributing to other students in the school a questionnaire asking for personal and frank information about the students' sexual attitudes, preference, knowledge, and experiences. In response to school officials' argument that such questions might result in emotional harm to other students, the court said:

> The First Amendment right to express one's views does not include the right to importune others to respond to questions when there is reason to believe that such importuning may result in harmful consequences. Consequently, where school authorities have reason to believe that harmful consequences might result to students, while they are on school premises, from solicitation of answers to questions, then prohibition of such solicitation is not a violation of any constitutional rights of those who seek to solicit. (563 F. 2d at 520)

Also, as indicated earlier, there are strong precedents throughout our law which recognize that the rights of juveniles are not, in all instances, equivalent to those of adults. This principle was recognized by the U.S. Supreme Court in the *Tinker* decision itself. It has been reaffirmed as recently as 1976, when the Supreme Court sustained without opinion a Pennsylvania curfew ordinance requiring all those under 16 years of age to be off the streets by ten p.m. unless in the company of their parents. (*Bykofsky v. Borough of Middletown*, 535 F 2d 1245 [1976] cert. den. 11/15/76)

The trend of federal court decisions has been to expand the application of First Amendment freedoms to the publications of secondary school students, but whether this trend will continue depends at least in part upon the willingness of school officials to seek out broader and more acceptable bases for resisting the directions taken by the courts, where they believe that the courts are going too far.

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The contributing editor to this Legal Memorandum is T. Page Johnson, principal of Oakton High School in Fairfax County, Va. and Adjunct Professor of School Law at the University of Virginia, Northern Branch.

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